No. 17-204

IN THE

Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION

APPLE, INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* VERIZON COMMUNICATIONS INC. IN SUPPORT OF NEITHER PARTY

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August 17, 2018

282721

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INTEREST OF *AMICUS CURIAE*[1]

Verizon Communications Inc., through its subsidiaries, (collectively, "Verizon") is a global leader in delivering innovative communications and technology solutions to consumer, business, government, and wholesale customers and provides integrated business solutions to customers in more than 150 countries.

Verizon regularly appears before the Court, both as a party and as an *amicus curiae*, including in cases involving antitrust law issues. *See, e.g.*, *Ohio v. American Express Co.*, No. 16-1454 (2018) ("*Amex*"); *Pac. Bell Tel. Co. v. LinkLine Communications, Inc.*, No. 07-512 (2009); *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126 (2007); *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, No. 02-682 (2004); *NYNEX Corp. v. Discon, Inc.*, No. 96-1570 (1998).

Verizon is a direct and indirect purchaser of goods and services; it also sells good and services to direct purchasers, who in turn sell to indirect purchasers. In addition, Verizon distributes its services through agency relationships. And finally, Verizon participates in two-sided markets (and more complex multi-sided markets) both as a provider of connective platforms and as a market participant relying on a platform for connection.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

In these endeavors, Verizon businesses rely both on "transaction platforms" as the Court defined the term in *Amex*, such as the credit card payment systems in Verizon-owned stores, and non-transaction platforms, such as newspaper advertising. In addition, Verizon businesses rely on a host of other platforms that may fall into these categories or other yet-to-be-defined categories, such as cloud computing, customer relationship management platforms, operating systems, and healthcare systems.

Verizon is also a platform provider itself. ThingSpace is Verizon's web-based Internet of Things ("IoT") platform that provides a workspace for developers to create applications and services for customers with connected IoT devices that are served by Verizon's network. BrightRoll by Yahoo! provides programmatic tools to help buyers and sellers of digital advertising space connect with each other, and ONE by AOL provides a mobile monetization platform that enables publishers, advertisers, and consumers to connect with each other. In short, platforms support Verizon's business, and in many instances, they are Verizon's business.

Verizon thus has a strong interest in the proper application of the antitrust laws and the Court's antitrust jurisprudence and, most relevant here, a heightened interest in how the Court applies those laws and precedents to these complex and developing markets.

Verizon expresses no opinion on the merits of this case. Rather, Verizon writes here to explain how the Court's treatment of two-sided platforms in *Amex* bears on this case and raises novel and important questions regarding how *Illinois Brick Co. v. Illinois*, 431 U.S. 720

(1977), should be applied in the context of two- or multi-sided platforms.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amex represented the Court's first foray into the developing field of two-sided platforms and its application to antitrust law. *See* Dirk Auer & Nicolas Petit, *Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy*, 60 Antitrust Bulletin 426 (2015) ("Auer & Petit") (describing "this novel field of academic work"). *Amex* presented the question whether to analyze two-sided platforms as one or two separate markets for the purposes of defining the relevant market.

Perhaps given the uncertainty in the economic theory and legal analysis of two-sided platforms, the Court ventured cautiously into this arena. Rather than attempt to rule broadly on the market-definition issue before it, the Court outlined its general conception of two-sided platforms and held only that, for a particular kind of platform—"transactional" platforms—both sides of the platform should be treated as one market. *Amex* slip op. at 12-13. As explained further below, the *Amex* decision, though narrow, has important implications for the application of *Illinois Brick* to two- or multi-sided platforms. Moreover, *Amex*'s potential application to this case serves as a useful reminder as the Court continues to formulate its approach to two- (and multi-) sided markets that each decision—even if limited—may bear on the next, in sometimes unexpected ways.

Verizon takes no position on the *Illinois Brick* question presented. Verizon writes to discuss how *Amex*

impacts this case and to raise broader questions about the application of antitrust law to two-sided platforms.

BACKGROUND

Respondents (the plaintiffs below) are iPhone users who purchased apps through the App Store. Pet. App. 46a. Their class-action complaint alleges that Petitioner violated the Sherman Act by monopolizing the distribution of iPhone apps and charging supracompetitive prices by imposing a 30% commission on the purchase of apps. Respondents seek treble damages under Section 4 of the Clayton Act. Pet. App. 53a.

The district court dismissed Respondents' action, holding that they lack standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which generally bars indirect purchasers from maintaining Section 4 treble-damages claims. *See In re Apple iPhone Antitrust Litig.*, 2013 WL 6253147, at *6 (N.D. Cal. Dec. 2, 2013).

The Ninth Circuit reversed, crafting an exception to *Illinois Brick* where the defendant who passes on the overcharge operates as the distributor of the goods sold to the plaintiff. *See In re Apple iPhone Antitrust Litig.*, 846 F. 3d 313 (9th Cir. 2017). The Ninth Circuit made clear that its analysis turned entirely on the fact that Apple is the distributor of apps from its App Store: "Because Apple is a distributor, [Respondents] have standing under *Illinois Brick*." *Id.* at 324. The Court granted certiorari to answer the question "[w]hether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense." Pet. at i.

ARGUMENT

The Court's recent decision in *Amex* suggests that Petitioner's App Store is a transaction platform. This means that there are purchasers on both sides of the platform. And as *Amex* makes clear, these purchasers—app developers and iPhone users—are best understood as purchasing the same item—transactions. In other words, the App Store appears to be a transaction platform with direct purchasers on both sides.

But that is really the beginning—not the end—of the analysis. As explained below, there are novel and important questions regarding how to apply *Illinois Brick* to two-sided platforms. Careful judicial guidance on those questions is needed for participants in these dynamic and rapidly changing markets.

A. The App Store Appears To Be A Two-Sided Transaction Platform Under *Amex*.

Amex was the first instance in which the Court expressly considered two-sided platforms and discussed how they differ from traditional markets. Although the Court did not purport to set out a comprehensive definition of two-sided platforms, it did identify some key characteristics thereof. As the Court explained, "a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them." *Amex* slip op. at 2 (citing Evans & Schmalensee, *Markets With Two-Sided Platforms*, 1 Issues in Competition L. & Pol'y 667 (2008); Evans & Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev.

667, 668; Filistrucchi, Geradin, Van Damme, & Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296 (2014)).

The Court explained that "[t]wo-sided platforms differ from traditional markets in important ways." *Amex* slip op. at 3. The key feature, the Court explained, is that "two-sided platforms often exhibit what economists call 'indirect network effects'"—which exist where "the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases." *Id.* Because of this interdependence, "two-sided platforms must be sensitive to the prices that they charge each side." *Id.*; *see also id.* ("Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand.").

The Court also recognized a "special type" of two-sided platform in which a platform "cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id.* at 2. In other words, these "transaction" platforms "facilitate a single, simultaneous transaction between participants." *Id.* at 13. The Court illustrated the point in the credit card market:

> the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-

> payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually.

Id.

Importantly, the Court made clear that the item being sold is the same to both sides; it is the *transaction itself*. *Amex* slip op. at 13 ("Transaction platforms are thus better understood as 'suppl[ying] only one product'—transactions.") (quoting Klein, Lerner, Murphy, & Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L. J. 571, 580 (2006)); *see also id.* at 14 n.8 ("'[C]redit-card companies are best understood as supplying only one product—transactions—which is jointly consumed by a cardholder and a merchant.").

In short, *Amex* generally conceives of two-sided platforms as those platforms that (1) offer "different products or services to two different groups who both depend on the platform to intermediate between them" and (2) exhibit interdependent "indirect network effects." *Id.* at 2, 3. *Amex* further conceives of transaction platforms as a subset of two-sided platforms having a third key characteristic; they "facilitate a single, simultaneous transaction between participants." *Id.* at 13.

Petitioner's App Store appears to fall within *Amex*'s conception of a transaction platform. First, the App Store is a platform where app developers sell apps capable of working on Apple's operating system and where iPhone users obtain those same apps. Pet. at 6 (citing Pet. App. 49a, 51a). In other words, the App Store is a platform that

offers "different products or services to two different groups who both depend on the platform to intermediate between them." *Amex* slip op. at 2.

Second, the two sides of the App Store exhibit an interdependence of indirect network effects. Perhaps the best depiction of this dynamic is the recently published 2008 interview with then-Apple CEO Steve Jobs, shortly after the launch of the App Store. *See 'The Mobile Industry's Never Seen Anything Like This': An Interview With Steve Jobs at the App Store's Launch*, Wall St. J. (July 25, 2018). In that interview, Mr. Jobs explained that as more developers launched new apps for the new App Store, *see id.* ("50 new apps a day coming in"), more iPhone users began downloading more of those apps, *see id.* ("Users have downloaded over 60 million apps from the App Store in the first 30 days."), thereby rapidly boosting the value of the App Store to both groups, *see id.* ("This doesn't happen very often. A whole new billion dollar market opens up. 360 million in the first 30 days, I've never seen anything like this in my career for software."); *see also id.* ("There's never been a mobile platform that's been this powerful before."); *see also* Pet. at 7 (noting that "iOS app developers earn[ed] over $20 billion in 2016 alone").

The App Store thus appears to exhibit the two key characteristics of a two-sided platform. And it also appears to exhibit the defining feature of a transaction platform because the App Store "cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Amex* slip op. at 2. It "facilitate[s] a single, simultaneous transaction between" app developers and iPhone users. *Id.* at 13.

B. There Are Novel And Important Questions In The Wake Of *Amex* About How *Illinois Brick* Should Apply To Two-Sided Transaction Platforms.

As explained above, the App Store appears to be a transaction platform under *Amex*. There are purchasers on both sides of this transaction platform. *See* David Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, *in* 1 The Oxford Handbook of International Antitrust Economics 404, 425-26 (Roger D. Blair & D. Daniel Sokol eds., 2014) ("Evans & Schmalensee"). And as *Amex* makes clear, these purchasers—app developers and iPhone users—are best understood as purchasing the same item: transactions. *See supra* 7-8; *see also* Evans & Schmalensee, at 420 ("The fundamental service provided by multisided platforms is the ability of economic agents on each side to interact in a valuable way with economic agents on other sides."). That much seems apparent from *Amex*. But what does that mean for the application of *Illinois Brick*?

If the relevant market includes both sides of a two-sided transaction platform, does that mean each is a direct purchaser of the platform? Does the simultaneity of a single transaction, *see Amex* slip op. at 13, affect whether treble damage claims by iPhone users challenging those commissions are barred by *Illinois Brick*? Are direct purchasers of a two-sided transaction platform limited to suing only for antitrust violations related to the transactions? If both sides are deemed direct purchasers, how might that impact potential class certification in a transaction platform case? Must the class include the purchasers on both sides? Or does it matter that Petitioner imposes a fixed-percentage fee to only one side of App

Store transactions? Does Petitioner's agency relationship with app developers mean that its App Store is not a two-sided transaction platform under *Amex* because Petitioner has direct purchasers on only one side of the platform?

Indeed, it is unclear whether the way Petitioner has structured its App Store via contractual arrangement might change the way the law views the market dynamics here more generally. Economic analysis of two-sided platforms suggests that both the structure of the arrangement and the conduct of the platform can morph a two-sided platform into a conventional market. *See* Michael Katz & Jonathan Sallet, ***Multisided Platforms and Antitrust Enforcement***, 127 Yale L.J. 2142, 2150 (2018) ("[W]hether a firm constitutes a multisided platform may depend on its conduct.") Auer & Petit, at 434 ("Clauses introduced in the distribution contract between a supplier and a supermarket may thus turn a two-sided market in a one-sided market.").

Although antitrust law is informed by and often imports economic principles and analysis, statutory interests and other concerns sometimes drive the adoption of judicial rules in this arena. *See, e.g.*, *Illinois Brick*, 431 U.S. at 740-42. But if iPhone users are not direct purchasers under *Illinois Brick* because of Petitioner's contractual arrangements, then would it not make sense that those same contractual arrangements might require looking at only one side of the App Store when making a determination of market definition? Relatedly, if Petitioner is not setting prices here, does that mean that the App Store platform is not operating as a two-sided platform as conceived by the Court in *Amex*? *See Amex* slip op. at 3 ("[T]wo-sided platforms must be sensitive *to the prices that they charge each side.*") (emphasis added).

Of course, these questions are not all before the Court in this case. But they underscore the complexity of the judicial task when addressing the application of antitrust law to two-sided platforms and show why courts should consider the potential broader implications of each narrow question that comes before them in the context of a particular two-sided platform.

C. Careful Judicial Guidance Is Needed On These Issues.

Guidance is needed on these complex questions, especially as two-sided platforms expand and grow in "economic importance." Evans & Schmalensee, at 440. Given the developing nature of economic theory in this novel, complex arena, *see supra* 5-6, courts should of course proceed with caution, *see, e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 414 (2004) (noting the need for caution in a "highly technical" industry that is characterized by "incessant, complex, and constantly changing interaction[s]" among market participants); Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 5 (2015). When forced to grapple with these novel questions, courts should consider the developing scholarly authority and engage with the complexities of two-sided platforms rather than simply reverting to existing precedent, which may not apply appropriately to two-sided platforms. *See* Auer & Petit, at 457 (warning against applying "existing legal tests mechanically to two-sided markets").

CONCLUSION

Amicus curiae respectfully requests that the Court take a measured approach (as it did in *Amex*) in articulating how antitrust law principles apply to two-sided markets and the implications of those principles for the *Illinois Brick* doctrine.

Respectfully submitted,

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